A JESUIT FATHER ON THE ACT.

(*The* GLOBE, *Toronto, March* 23, 1889).

Answer to the "Opinions of The Law Journal."

The whole gist of the objection is contained in the following extract, to which I take exception. All other citations of laws, etc., etc., and conclusions drawn thereform do not differ materially from it:—

"But the statutes of Elizabeth are precise and emphatic and in express words abolish the usurped power and jurisdiction of the Bishop of Rome, heretofore unlawfully claimed and usurped within this realm, and other the dominions to the Queen's Majesty belonging. (1 Eliz., c. 1.; 13 Eliz., c. 2.)

"Neither the treaty surrendering Canada to England, nor the Quebec Act of 1774, altered the statutory prohibitions against the foreign jurisdiction of the Pope Both granted to the French Canadian subjects of the Crown liberty to profess the Roman Catholic religion, 'so far as the laws of Great Britain permit' and in subjection to the Crown and Parliament of Great Britain."

What the Law Journal terms "liberty to profess" is thus stated in the capitulations and treaty:—Capit. of Quebec, art. 6, "Libre exercice à la Religion Romaine." Capit. of Montreal and all Canada, art. 26, "The free exercise of the Catholic Apostolic and Roman religion shall subsist entire," etc., etc. "Granted as to the free exercise of their religion," etc. (See pamphlet.—"GAZETTE AND MAIL'S CAMPAIGN," etc, p. 36).

Treaty:—"His Britannic Majesty agrees to grant the liberty of the Catholic religion to the inhabitants of Canada. He will consequently give the most effectual order that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Roman Church, as far as the laws of Great Britain permit (le permettront)." (Ibid., p. 38.)

The Law Journal sets at naught two undeniable principles; the key of the whole question:—Treaties become the supreme law of the land. (Ibid., pp. 34, 35). The penal laws of Elizabeth, etc., did not extend to the Colonies. (Ibid., pp. 46, 67.)

That the penal laws dit not extend to the Colonies will be admitted by all. (See pamphlet, pp. 46, 47.)

But besides the general principle, there were other more cogent reasons why they should have no force in Canada. Treaties and capitulations are the supreme law of the land, so that even if the king had the right to extend the penal laws to other dependencies he precluded himself by treaty stipulations from extending them to Canada.

Ratified treaties are beyond the powers of King or parliament, though the Constitution itself be not. (See pamphlet, p. 34.)

So that even were there a constitutional point ceded in such solemn compacts, it is beyond the power of all the branches of the Legislature to repeal it. The application of the principle has a stronger binding force when there is no question of subsequent but of antecedent legislation, for in the latter case inadvertency cannot be pleaded in palliation, as the penal laws existed previously and were fully known to the contracting party who ceded his right.

Chitty is very explicit in the matter, though had Chitty never written reason itself would force us to the same conclusion :

"Nor can the King legally disregard or violate the articles on which a country is surrendered or ceded but such articles are sacred and inviolable according to their true intent and meaning." (Prerogatives, etc., ch. iii., p. 20, edit. London, 1820.) (Ibid., p. 35.)

"The King may preclude himself from the exercise of his prerogative legislative authority in the first instance over a conquered or ceded country by promising to vest in it an assembly of the inhabitants, and a governor, or by any measure of a similar nature," etc., etc. (Prerogatives, p. 30.) (Ibid., p. 35)

Nor is it necessary that the Sovereign intervene directly.

"Since the general of an army and the governor of a town must be naturally invested with all the powers necessary for the exercise of their respectives functions, we have a right to presume that they possess those powers, and that of concluding a capitulation is certainly one of the number, especially when they cannot wait for the Sovereign's order. A treaty made by them on that subject is therefore valid and binds the Sovereigns in whose names and by whose authority the respective commanders have acted." (Chitty's de Vattel, b. iii., ch. xvi., sec. 261.) (Ibid., p 42.)

And when the conquering sovereign oversteps his power as in the proclamation of the 7th of October, 1763, relative to the new Governments in North America, which proclamation was at variance with the treaty, his very Attorney-General, Thurlow, in the House of Commons, scouts at the idea of its provisions being binding :

"With regard to the proclamation, I never imagined that a proclamation so exceedingly loose and general could be pleaded as an authority. I stated in the beginning that it did not affect to relate to Canada, but I said that the capitulation did reserve all their effects, moveable and immoveable. But even if it were otherwise is it to be supposed that the tithe would accrue to the King? The tithe is collateral to the land, not sunk in it. To give the right to it, is giving to the secular body, as well as the regular clergy, all they were in possession of before. It was always my opinion an established fact that the clergy in Canada were entitled to tithes, though they might not have sued for them." (Debates, 1774, p. 71 ; see also p. 68.)

The then Premier, Lord North, was equally emphatic :—"Whatever the proclamation may have done, it certainly did not repeal the definite treaty." (Ibid., p. 63.)

We all know that James Marriot, the King's advocate, in his letter of May 12th, 1765, to the Attorney-General and Solicitor-General, Sir Fletcher Norton and William de Grey, held a different view. But only

one month later, on June 10th, these two law officers of the Crown returned a negative answer to the following question submitted to them by the Lords of Plantation Affairs : —" Are not the Roman Catholic subjects of His Majesty, residing in the countries of America ceded to His Majesty, subject in those Colonies to the same civil disabilities and penalties to which Roman Catholics in the realm are subject by law ? " (Pamphlet, p. 67.)

The King himself understood perfectly well and admitted the principle that he was bound by the treaty over and above all other obligations, though as a matter of fact he may not have been thoroughly informed as to the full contents of the treaty itself. This is evident from a clause in the Royal Instructions of 1791 :—

Ibid., pp. 49, 50 :—" It is our will and pleasure that all other religious seminaries and communities (that of the Jesuits only excepted) do for the present, and *until we can be more fully informed* of the true state of them and *how far they are not essential to the free exercise of the religion of the Church of Rome* as allowed within our said Province, remain upon their present establishments." (Chisholm Papers, p. 150, Library of Parliament, Ottawa, E. No. 421.)

Not to speak, therefore, of the fact that the Jesuits remained a body corporate down to 1791, and very likely to the moment of their extinction, all these different facts go to prove not only the principle that the different enactments quoted so voluminously by The Law Journal were never considered as binding in Canada, but that in practice they never found their application in the Colony.

What now of the principle so strongly emphasized by The Law Journal, " That the statutes of Elizabeth in express words abolish the usurped power and jurisdiction of the bishops of Rome, heretofore unlawfully claimed and usurped within this realm and other dominions to the Queen's Majesty belonging"?

I say that even in the hypothesis that they had in general any force in the Colonies, by treaty they were excluded from finding application here. The treaty was of a nature to suspend such application in other points, as is clear from what has preceded. If it had power in one point, regarding such enactments as penal, it had it in all ; for there was never question of any other save spiritual jurisdiction. Nor could there be any free exercise of the Roman Catholic religion in any country without toleration in the exercise of that spiritual jurisdiction.

But in Canada it went beyond toleration, it extended to recognition, and Lord Bathurst, in his letter dated the 2nd July, 1813, was the first Secretary for the Colonies to officially recognize M. Plessis, who had been consecrated on the authorization of Papal Bulls, as the Catholic Bishop of Quebec. The extract from this letter may be found in Vol. 6, p. 312, of CHRISTIE'S HISTORY OF CANADA.

Mr. H. W. Ryland's conscientious scruples as to the propriety of such recognition were allayed by Secretary Brenton's letter of the 2nd November, 1813, which runs as follows :—

" As by the enclosed extract from Lord Bathurst's letter respecting the additional allowanee to the Rev. M. Plessis, he appears to recognise him as the Catholic Bishop of Quebec. His Excellency does not see any objection to a compliance with Mr. de Plessis' wishes in styling him Roman Catholic Bishop of Quebec, unless there should

be any particular instruction of His Majesty to the contrary." (Ibid., p. 312.)

Mr. Ryland could only suggest the Royal Instructions of 1791 ; but no heed was paid to his remonstrance. (Ibid., p. 313).

On the 30th April, 1817, was issued the mandamus which gave Mgr. Plessis a seat in the Legislative Council in his capacity of Catholic Bishop of Quebec. Mr. Sewell protested against this measure as tending to establish Papal supremacy ; he even endeavored to persuade the Ministers to reconsider their decision, insisting that they should at least save appearances, but he could obtain nothing, while Lord Bathurst went still further and consented to recognize a coadjutor Bishop *cum futura successione* whenever he would be presented to the Governor. (Etudes Historiques et Légales sur la Liberté Religieuse en Canada, par S. Pagnuelo, Q. C., Montréal, 1872).

It is by far too late in the day to question the constitutionality of the incorporation of religious orders. At least fifty years ago the Corporation of St Sulpice was recognised, since which time the Oblates, the Redemptorists. the Dominicans and others have been in their turn incorported without a word of remonstrance.

If The Law Journal is really anxious to test the constitutionality of the Act of a Provincial Government based on the validity of Papal bulls, we recommend to its consideration as a test case the Episcopal Corporation of " The Roman Catholic Bishop of Montreal in the Province of Lower Canada."

Just fifty years ago on the 15th of next August, Governor Colborne issued under the seal of the Province letters patent of incorporation and "amortissement," constituting Mgr. Jean Jacques Lartigue, Bishop of the Roman Catholic Diocese of Montreal, and his successors, a sole ecclesiastical corporation, with the above-mentioned appellation, with perpetual succession for him and his successors (Pagnuelo, Ibid., p. 160.)

We have here a Provincial Act depending entirely on Papal bulls and Papal approbation ; for no other than the one chosen by the Holy See can be recognized as forming that sole corporation, and had Mgr. Lartigue been removed or transferred to another see, he would have ceased forthwith to be sole corporator. Two bishops have since succeeded him without remonstrance or protestation.

If, then, the Jesuit incorporation be unconstitutional, the Episcopal Corporation of Montreal is unconstitutional for a like reason. If the Jesuit bill of compensation be unconstitutional for the reason that the Provincial Act is made dependent on the will of the Pope, a similar state of things would necessarily invalidate the incorporation of the Roman Catholic Bishop of Montreal.

This corporation has received the sanction of time and of more than one subsequent legislative Act. It will consequently be apparent to all that if the issue raised by The Law Journal were ever brought before the Privy Council it could not for one moment be seriously maintained.

A. E. JONES, S. J.

St. Mary's College, Montreal, March 19, 1889.